



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 4, 2004

Ms. Stephanie Bergeron
Environmental Law Division, Director
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

OR2004-1637

Dear Ms. Bergeron:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 197212.

The Texas Commission on Environmental Quality (the "commission") received a request for certain information pertaining to a specified air quality permit application. You claim that the requested information may be confidential under sections 552.101 and 552.110 of the Government Code and/or excepted from disclosure pursuant to section 552.104 of the Government Code, but make no arguments and take no position as to whether the information is so excepted. You inform us that the commission notified Jones Blair Company ("Jones Blair"), the third party whose proprietary interests may be implicated by the request, of the commission's receipt of the request and of Jones Blair's right to submit arguments to us as to why any portion of the requested information should not be released to the requestor. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act (the "Act") in certain circumstances). We have considered all claimed exceptions to disclosure and have reviewed the submitted information.

The commission claims that the submitted information may be excepted from disclosure pursuant to section 552.104 of the Government Code. The purpose of section 552.104 is to

protect the interests of a governmental body, usually in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). You have not submitted any arguments in support of your claim that the submitted information may be excepted under section 552.104 of the Government Code. Accordingly, we conclude that the commission has waived any claim that it has with respect to the submitted information under section 552.104 of the Government Code and may not withhold any portion of the information on that basis. *See* Gov't Code §§ .301, .302.

We next address arguments submitted to us by Jones Blair. Jones Blair claims that portions of the submitted information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code.¹ Section 382.041 provides in relevant part that "a member, employee, or agent of [the commission] may not disclose information submitted to [the commission] relating to secret processes or methods of manufacture or production that is identified as confidential when submitted." Health & Safety Code § 382.041(a). This office has concluded that section 382.041 protects information that is submitted to the commission if a *prima facie* case is established that the information constitutes a trade secret under the definition set forth in the Restatement of Torts and if the submitting party identified the information as being confidential in submitting it to the commission. *See* Open Records Decision No. 652 (1997). The commission informs us that the submitted information was designated as being confidential when it was submitted to the commission.

Jones Blair claims that the information at issue constitutes trade secret information pursuant to section 552.110(a) of the Government Code. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). Under section 757 of the Restatement of Torts, a "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or

¹ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

The following six factors are relevant to the determination of whether information qualifies as a trade secret under section 757 of the Restatement of Torts:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). If a governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a person's trade secret claim under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990).

Jones Blair informs us that the information at issue contains process and/or production information that relates to the operations of Jones Blair's paint manufacturing and production processes. Jones Blair argues that this information satisfies the six indicia of a trade secret under section 757 of the Restatement of Torts and, thus, qualifies as a trade secret for purposes of section 552.110(a) of the Government Code. Based on our review of Jones

Blair's arguments and the information at issue, we find that Jones Blair has established a *prima facie* case that most of the information at issue qualifies as trade secret information for purposes of section 552.110(a) of the Government Code and we have received no arguments that rebut Jones Blair's position as a matter of law. Accordingly, we conclude that the commission must generally withhold the information at issue that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code.

However, we note that portions of this information contain information relating to emissions. Under the federal Clean Air Act, emission data must be made available to the public, even if the data otherwise qualify as trade secret information. *See* 42 U.S.C. § 7414(c). Thus, to the extent that this particular information contains information that constitutes emission data for purposes of section 7414(c) of title 42 of the United States Code, the commission must release that information to the requestor in accordance with the federal law.

Jones Blair also contends that the remaining submitted information at issue is excepted from disclosure pursuant to section 552.110(b) of the Government Code. Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure). After careful consideration of Jones Blair's arguments and our review of the remaining submitted information at issue, we find that Jones Blair has failed to adequately demonstrate that any portion of this particular information constitutes commercial or financial information the release of which would cause Jones Blair substantial competitive harm for purposes of section 552.110(b). Accordingly, we conclude that the commission may not withhold any portion of the remaining submitted information at issue under section 552.110(b) of the Government Code.

Finally, Jones Blair claims that the remaining submitted information at issue is excepted from disclosure pursuant to section 552.125 of the Government Code. Section 552.125 excepts from disclosure "[a]ny documents or information privileged under the Texas Environmental, Health, and Safety Audit Privilege Act" (the "EHSAP"). Gov't Code § 552.125. We note that the stated purpose of the EHSAP "is to encourage voluntary compliance with environmental and occupational health and safety laws." V.T.C.S. art. 4447cc, § 2. In furtherance of its stated purpose, the EHSAP provides for the

confidentiality of environmental or health and safety audits voluntarily performed by or for the owner or operator of a facility that is regulated under an environmental or health and safety law. *See id.* §§ 3, 5, 6.

Section 3 of the EHSAP defines “environmental or health and safety audit” as follows:

(3) "Environmental or health and safety audit" means a systematic voluntary evaluation, review, or assessment of compliance with environmental or health and safety laws or any permit issued under those laws conducted by an owner or operator, an employee of the owner or operator, or an independent contractor of:

(A) a regulated facility or operation; or

(B) an activity at a regulated facility or operation.

Id. § 3. Section 5 of the ESHAP provides in part:

(a) An audit report is privileged as provided in this section.

(b) Except as provided in Sections 6, 7, and 8 of this Act, any part of an audit report is privileged and is not admissible as evidence or subject to disclosure

....

Id. § 5.² Section 4 of the ESHAP provides in part:

(a) An audit report is a report that includes each document and communication, other than those set forth in Section 8 of this Act, produced from an environmental or health and safety audit.

(b) General components that may be contained in a completed audit report include:

(1) a report prepared by an auditor, monitor, or similar person, which may include:

² Section 12 of the EHSAP provides that “[t]he privilege created by this Act applies to environmental or health and safety audits that are conducted on or after the effective date of this Act,” which is September 1, 1997. V.T.C.S. art. 4447cc, § 12; *see also* Texas Environmental, Health, and Safety Audit Privilege Act, 74th Leg., R.S., ch. 219, §§ 5, 6, 1995 Tex. Gen. Laws 1963, 1965-66 (predecessor statute providing for confidentiality of audits conducted prior to September 1, 1997).

- (A) a description of the scope of the audit;
 - (B) the information gained in the audit and findings, conclusions, and recommendations; and
 - (C) exhibits and appendices;
- (2) memoranda and documents analyzing all or a portion of the materials described by Subdivision (1) of this subsection or discussing implementation issues; and
 - (3) an implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance.

Id. § 4. Jones Blair claims that the remaining submitted information at issue constitutes information gained in an audit conducted by Jones Blair. However, after carefully reviewing Jones Blair's arguments and reviewing this particular information, we find that Jones Blair has not adequately demonstrated that any portion of this information constitutes an "audit report" or a component from an "audit report" as described in section 4 of the ESHAP. Accordingly, we conclude that the commission may not withhold any portion of the remaining submitted information at issue under section 552.125 of the Government Code and it must be released to the requestor.

In summary, the commission must generally withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code. The commission must release the information that constitutes emission data for purposes of section 7414(c) of title 42 of the United States Code in accordance with that federal law, the information that we have marked for release, and the portions of the submitted information that Jones Blair did not claim were excepted from disclosure.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 197212

Enc. Marked documents

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